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Supreme Court, U.S.
FILED
OCT 10 1996
CLERK

No. 96-468

In The

Supreme Court of the United States

October Term, 1996

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, AND DAVID JACK WRIGHT,

Cross-Petitioners,

v.

K MART CORPORATION,

Cross-Respondent.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER/CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

1. Whether the tolling rule applicable to class actions brought pursuant to Fed.R.Civ.P. 23 or the statutory tolling rule in Section 256 of the Fair Labor Standards Act, 29 U.S.C. § 256 (1994), should govern the tolling of the period of limitations for opt-in claims in a class action brought under the Age Discrimination in Employment Act ("ADEA")?

2. Whether the temporal scope of an ADEA class should be measured by the timely charge of a named plaintiff in the lawsuit or by a charge filed by a putative class member whose own, opt-in claim is time barred?

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INTRODUCTION

Petitioner/Cross-Respondent K Mart Corporation ("K Mart") has previously filed its Petition for Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed April 9, 1996, which petition has been docketed as Case No. 96-98. Respondents in that action have filed a "conditional cross-petition", which K Mart respectfully submits highlights the reasons why K Mart's petition should be granted.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is published at 79 F.3d 1086 and is reprinted in the appendix accompanying K Mart's petition in Case No. 96-98, which is incorporated by reference. The unpublished, June 29, 1994 opinion of the United States District Court for the Northern District of Georgia also is reprinted in the appendix to the petition filed in Case No. 96-98.

JURISDICTION

Both K Mart and Respondents/Cross-Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

The procedural history of this case has been described in detail in K Mart's Petition for Writ of Certiorari in Case No. 96-98 and in the underlying decision of the court of appeals and need not be restated herein in detail. In brief, K Mart's petition and respondents' cross-petition arise out of two, multi-plaintiff age discrimination lawsuits filed in the United States District Court of the Northern District of Georgia in 1992. After completion of discovery in the first-filed action, the Honorable Julie E. Carnes issued an Order holding that the eleven demotion claims at issue had not been properly joined and should be severed for separate proceedings. *Grayson v. K Mart Corp.*, 849 F. Supp. 785 (N.D. Ga. 1994).[1] Approximately six months later, the Honorable Marvin H. Shoob allowed five plaintiffs in the second lawsuit, which had been filed some ten months after the *Grayson* case, to amend the Complaint to convert their lawsuit to an "opt-in" class action pursuant to 29 U.S.C. § 216(b) (1994). *Helton v. K Mart Corp.*, Civ. No. 1:92-CV-2564-MHS (N.D. Ga. July 21, 1994). Shortly thereafter, Judge Carnes entered a conditional, *sua sponte* order allowing the six former *Grayson* plaintiffs remaining in her court to opt-in as plaintiffs in the *Helton* class action.

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[1] In a companion order, entered pursuant to 28 U.S.C. § 1404(a), Judge Carnes transferred the claims filed by five non-Georgia plaintiffs to districts in Florida and North Carolina in which the named plaintiffs had been employed. *Bell v. K Mart Corp.*, 848 F. Supp. 996 (N.D. Ga. 1994).

In a ruling issued in consolidated appeals from these decisions, the Eleventh Circuit dismissed the appeal in *Grayson*, leaving undisturbed Judge Carnes' severance order, and affirmed in part and reversed in part Judge Shoob's class action ruling in *Helton*. *See Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). The Eleventh Circuit affirmed the ruling allowing *Helton* to proceed as a class action, but restricted the temporal scope of the class to include only those persons who had been demoted or "removed" from Store Manager positions within 300 or 180 days of the "representative" charge filed by *Helton* plaintiff Charles Kempton on or about April 15, 1992. 79 F.3d at 1102-05. The Court of Appeals reversed Judge Shoob's ruling that had extended the temporal scope of the class to include all persons demoted within 180 or 300 days of the EEOC charge filed in 1991 by opt-in plaintiff David Grayson. In addition, the Court of Appeals ruled that Judge Shoob had erred in allowing the former *Grayson* plaintiffs and others demoted before the effective date of the Civil Rights Act of 1991 to file opt-in consents to join the *Helton* class after the applicable statute of limitations governing their claims had expired.[2]

The Eleventh Circuit limited the temporal scope of the *Helton* "opt-in" class action, but the case still includes

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[2] This ruling had the effect of dismissing from the case the opt-in claims of Mr. Grayson and each of his former co-plaintiffs in the *Grayson* lawsuit. As noted by the Court of Appeals, Judge Carnes had entered a conditional order allowing the *Grayson* plaintiffs to "refile" their separate lawsuits in the event they were not allowed to proceed as plaintiffs in the *Helton* case. 79 F.3d at 1095.

multiple, factually distinct demotion claims of persons demoted from Store Manager positions from as early as June 21, 1991[3] until the end of calendar year 1992. The demotions at issue occurred in 17 different states, the United States Virgin Islands, and Puerto Rico. K Mart submits, as argued in its Petition in Case No. 96-98, that the Eleventh Circuit erred in allowing multiple, disparate treatment claims to be litigated in an ADEA class action. However, it does not follow that the Eleventh Circuit's temporal scope ruling also should be reviewed on certiorari and vacated.

2. Statement of Facts

The essential facts showing why K Mart submits that Judge Shoob and the Court of Appeals erred in allowing this action to proceed as a class action are stated at pp. 5-10 of the Petition for Writ of Certiorari in Case No. 96-98. The additional facts summarized herein are relevant to the "temporal scope" issue raised by Respondents/Cross-Petitioners and relate to the timing of the demotion decisions at issue and the filing of the administrative charges underlying the plaintiffs' claims.

K Mart operates on a fiscal year basis, which ends on the last Thursday in January of each year. At that time, K Mart prepares operational reports and related documents summarizing the annual results of the fiscal year operations of each store. In addition, K Mart District Managers, who are assigned supervisory responsibility

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[3] This date is 300 days before the "representative" charge filed by *Helton* plaintiff Kempton on April 15, 1992.

for approximately 10-15 stores in a particular geographic district, prepare annual evaluations rating the performance of the managers in those stores. These evaluations are then reviewed by "subregion" managers and ultimately by the Vice President of the Southern Region. Poor store operating results, coupled with poor annual appraisals and other negative reviews of store operations lead to adverse personnel actions against the responsible Store Managers.[4] Thus, most of the demotion decisions at issue were made after the close of K Mart's fiscal year and in the late winter or spring of the calendar year.

All eleven of the *Grayson* plaintiffs were demoted in early 1991, based in large part on negative operational reports and evaluations prepared during and shortly after the end of the preceding fiscal year. However, unlike the *Grayson* plaintiffs, three of the five named plaintiffs in *Helton* were demoted during calendar year 1992, based on substandard performance during the 1991 fiscal year. Of these five plaintiffs, plaintiff Kempton filed the first timely charge that even arguably gave "adequate notice to the EEOC of the scope of the class alleging discrimination." 79 F.3d at 1105. The Kempton charge, which alleged, *inter alia*, that "[w]ithin the last year, at least

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[4] Respondents/Cross-Petitioners mischaracterize the operational reports, evaluations, store visit reports, and annual audits at issue as efforts to "build a case" or otherwise create a paper trail documenting pretextual reasons to terminate older managers. As pointed out in Kmart's initial petition in Case No. 96-98 at pp. 8-9, the facts do not support plaintiffs' theory. No evidence shows that any of the evaluations, ratings or operational reports in plaintiffs' files have been falsified or created for the purpose of "getting rid of" older managers.

fifteen (15) other Store Managers, all over age 40, had been demoted", was filed on April 15, 1992. *Id.* at 1170. K Mart submits that this charge did not adequately apprise the EEOC or K Mart of the proposition that plaintiff Kempton (or any other charging party) sought to pursue a "class-wide" claim of age bias based on demotions during a three-year period throughout the entire Southern Region.

It is undisputed that the EEOC did not conduct any class-wide investigation or "conciliation" of plaintiff Kempton's charge or any other charge at issue in this case. Rather, the only "determination" issued by the EEOC, which addressed the charge filed by *Helton* plaintiff Bob Williams, concluded that there was "no cause" to believe that Williams had been the victim of age bias. Moreover, because plaintiff Williams was advised that he would be demoted more than 180 days before he filed his charge with the EEOC, his ADEA claim is time barred. *See, e.g., Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Thus, while K Mart submits that the Court of Appeals erred in allowing the Kempton charge to be the basis for "piggybacking," the Kempton charge was the "first timely filed charge of a *named plaintiff*" that could be used to measure the temporal scope of the class. 79 F.3d at 1102 (emphasis in original).

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

1. The Eleventh Circuit's Decision Limiting The Appropriate Temporal Scope Of The Opt-In Class Does Not Present Issues Warranting Review By This Court

K Mart has argued, as its third reason for granting a writ of certiorari, that the Eleventh Circuit erred in applying the "piggybacking" concept, also known as the "single filing" rule, to allow persons to "opt-in" as plaintiffs in the *Helton* class without having filed individual charges of age bias. Whatever the efficacy of the "piggybacking" concept in cases involving "continuing violations" based on application of a discrete, discriminatory policy, *see, e.g., Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert denied*, 434 U.S. 891 (1977), K Mart respectfully submits that "piggybacking" should not be allowed in a case involving a series of individual, disparate treatment claims. *See Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1255 (1995).

K Mart also submits that piggybacking is not appropriate absent the filing of a true, "class-wide" charge which in fact had caused the EEOC to conduct a "pattern and practice" investigation, leading to conciliation of the class-wide plaintiffs' claims. There was no class-wide investigation or conciliation of any of the charges underlying this case. A non-specific reference to the alleged demotions of 15 other, older managers, without more, should not satisfy the need for a broadly based, class-wide charge as a prerequisite to an ADEA class action case.

Respondents/Cross-Petitioners have opposed K Mart's Petition for Writ of Certiorari arguing, *inter alia*, that application in an ADEA case of the "piggybacking rule is not controversial." However, in support of their own Conditional Cross-Petition for Writ of Certiorari, respondents/cross-petitioners argue that there is a split between the circuits on the piggybacking question. They contend that the Eleventh Circuit's decision limiting the temporal scope of the opt-in class cannot be "reconciled" with the rulings of other circuits, including the ruling in *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, 499 U.S. 983 (1991), and that the split of authority has been "deepened" by a recent decision of the United States Court of Appeals for the Third Circuit rejecting the *Tolliver* court's analysis. *See, e.g., Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506-07 (3d Cir. 1995).

K Mart respectfully submits that these arguments confirm that there are significant uncertainties concerning applicability of the "piggybacking" concept that should be resolved on certiorari, as argued in section 3 of K Mart's original petition.[5] However, it does not follow that this Court also should review the Eleventh Circuit's ruling that the temporal scope of the class should be

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[5] For instance, in *Tolliver*, the court cites at least two and possibly three lines of authority applying the "piggybacking" concept. The outcome in these cases depends in part on whether the class is "of modest size" or consists of a "large group" of victims of alleged bias. 918 F.2d at 1058-59. K Mart respectfully submits that any class referenced in the Kempton charge is modest at best and does not warrant expansion of the case to include demotions in seventeen different states, Puerto Rico and the Virgin Islands.

measured by an EEOC charge filed by one of the named plaintiffs in *Helton* and not by the time-barred claim of opt-in plaintiff Grayson.

Plaintiffs argue that the Eleventh Circuit's ruling creates a split between the circuits because the court below refused to allow potential opt-in plaintiffs to "piggyback" on a charge filed by another, opt-in plaintiff who was not a named plaintiff in the *Helton* case. While K Mart asserted this proposition in the court below, suggesting that such an approach would allow the scope of an ADEA class to be extended backwards in time indefinitely, the Court of Appeals did not actually decide this issue. To the contrary, the Court of Appeals recognized that in limited circumstances, some other courts had allowed "the charge of someone other than a named plaintiff [in] the class action . . . [to] serve as the underlying . . . charge on which a putative plaintiff can piggyback." 79 F.3d at 1103. Thus, rather than rejecting the *Tolliver* court's analysis, which the court did not even cite,[6] the Eleventh Circuit

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[6] Respondents/Cross-Petitioners' reliance on *Tolliver* is misplaced given the procedural history of that case, which arose out of the "decertification" of an ADEA class by a district court in New Jersey. *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *rev'd in part on other grounds sub nom, Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), *adhered to on remand*, 122 F.R.D. 463 (D.N.J.), *app. dismissed*, 975 F.2d 964 (3d Cir. 1992). The plaintiffs in *Tolliver* had filed opt-in consents to join the *Lusardi* class; however, their opt-in claims were dismissed when the class was "decertified." The Second Circuit ruled that the opt-in claimants dismissed from *Lusardi* could file separate lawsuits to assert their individual claims even though they had not filed charges of age bias with the EEOC. *See* 918 F.2d at 1054 ("[T]he claims filed by the named plaintiffs in [*Lusardi*] suffice to permit the

based its decision on the unique characteristics of Mr. Grayson's individual charge, which it concluded was "particularly inadequate as a representative charge." 79 F.3d at 1104.

First, the court noted that opt-in plaintiff Grayson had been demoted on April 9, 1991, but had not filed his "consent" to join the *Helton* class until more than three years later, on September 19, 1994. As a result, the court held that Grayson was "time barred" from participating in the *Helton* class and that his time barred charge could not "serve as the representative charge for others" in that case. *Id.* This ruling is fully consistent with *Tolliver*, in which the Second Circuit noted that the piggybacking concept allows "the timely filing of an administrative charge *by a named plaintiff* in a class action [to] satisf[y] the charge filing obligation of all members of the class." 918 F.2d at 1056 (emphasis added).

In addition, the Eleventh Circuit held that the allegations of Grayson's charge gave notice of demotions that had occurred prior to the filing of that charge on June 14, 1991, but that it did not "put the EEOC on notice of demotions occurring" afterwards. 79 F.3d at 1104. Thus, the court concluded that Judge Shoob had erred in selecting the Grayson charge as the "representative charge" and that he should have chosen instead the "first timely filed charge of one of the named plaintiffs that gives adequate notice of the scope of the class." *Id.* at 1104-05.

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individual suits to go forward . . . "). Thus, the *Tolliver* action is procedurally distinguishable from this proceeding.

K Mart respectfully submits that this Court should review and decide the question of whether or not piggybacking should be allowed in an ADEA case, thereby clarifying considerable uncertainty about this issue. However, even if piggybacking were appropriate in this or any other ADEA case, which is a proposition that K Mart vigorously contests, then the Court of Appeals' ruling requiring the applicable, "representative" charge to be a timely charge filed by a *named* plaintiff is not an issue that should be reviewed on certiorari.

2. The Eleventh Circuit's Decision Regarding The Time Of Commencement Of An Opt-In Claim Does Not Warrant Review By This Court

As noted above, the appellate court's decision to reverse Judge Shoob's "selection" of the Grayson charge as a basis for piggybacking was based in part upon its ruling that Grayson's opt-in claim should be dismissed from the case as time barred by the longest, applicable three-year statute of limitations in effect at the time of his demotion. The three-year statute at issue, which is included in 29 U.S.C. § 255, was deleted from the ADEA effective November 21, 1991 by the Civil Rights Act of 1991. *See* 29 U.S.C. § 626(e) (Supp. V 1993). There is no dispute that this amendment is not retroactive. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Nevertheless, respondents/cross-petitioners argue that the Eleventh Circuit erred in applying the statute of limitations to bar opt-in claims filed by persons demoted before November 21, 1991 who did not join the *Helton* case by filing "consents" within three years. Respondents/Cross-Petitioners contend that the Eleventh Circuit's decision conflicts with

the ruling in *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463 (3d Cir. 1994), thereby warranting review on certiorari.

In *Sperling*, the Court of Appeals for the Third Circuit relied upon authority in Title VII class actions, concluding in effect that because the ADEA shares many similarities with Title VII, the statute of limitations for opt-in plaintiffs should be tolled by the filing of the original class action complaint and not by the filing of the "consents" themselves, as required by 29 U.S.C. § 256 (1994). As ruled by the Eleventh Circuit, however, the *Sperling* court's decision to "borrow" tolling concepts from Title VII, in which class actions are governed by Fed.R.Civ.P. 23, would be inconsistent with the proposition accepted by the Eleventh Circuit, that ADEA class actions are based solely and exclusively upon the FLSA and are not subject to the requirements of "commonality" and "typicality" incorporated in Rule 23.[7] Adopting Rule 23 concepts for tolling the period of limitations would be inconsistent with the Eleventh Circuit's ruling (which K Mart submits is erroneous) that the "similarly situated" standard in § 216(b) is "more elastic and less stringent" than the joinder and severance requirements in Rules 20

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[7] Other courts have applied Rule 23 standards in limiting the scope of an ADEA class. *See, e.g., Gorence v. Eagle Food Ctrs., Inc.*, No. 93-C-4862, 1994 WL 445149 *6 (N.D. Ill. Aug. 16, 1994) ("[m]any courts and commentators have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant to the FLSA or ADEA, despite their distinct procedures for instituting class actions.").

and 42 and not as "involved" as the class action standards applied under Rule 23.[8] 79 F.3d at 1095.

Respondents' cross-petition for writ of certiorari on the "tolling" issue again highlights the reasons why K Mart's petition should be granted. However, if, contrary to what K Mart submits is the weight of authority, an ADEA class action may be allowed to proceed relying solely upon the "similarly situated" language of the FLSA, to the exclusion of the other procedural safeguards that historically have limited class action litigation, then it follows that the provisions of the FLSA governing the commencement of the opt-in case also should be applied.

The FLSA tolling rule is a matter of statute, incorporated expressly in 29 U.S.C. § 256 (1994).[9] The plain

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[8] As argued at pp. 14-15 of K Mart's Petition in Case No. 96-98, the opt-in provisions of the FLSA are a form of joinder device that was borrowed by Congress from the "spurious" class action provisions of former Rule 23(a)(3). If anything, the "spurious" class action is a narrower form of class action than the "true," representative class action allowed by the current version of Rule 23. Consistent with this Court's ruling in *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), courts have consistently and repeatedly refused to allow class actions to proceed when individual, fact-specific issues predominate over true, class-wide claims. *See, e.g.*, cases cited at pp. 13-16 of K Mart's Petition in Case No. 96-98.

[9] This statute provides that in determining the applicable period of limitations, an action under the FLSA is commenced

> when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended . . . it shall

language of this statute governs the tolling of the period of limitations for FLSA class actions and should likewise govern the period of limitations with respect to those ADEA claims that accrued before the effective date of the Civil Rights Act of 1991. Thus, any ruling addressing the "tolling" question could only affect class action lawsuits filed on or before November 21, 1994 involving claims based on pre-amendment acts. Any class action based on claims that arose before November 21, 1991 and filed after November 21, 1994 would be time barred by the pre-Civil Rights Act of 1991 statute of limitations. Thus, the tolling issue raised in the cross-petition for writ of certiorari is not a matter of sufficient importance to warrant review in this case.

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be considered to be commenced in the case of any individual claimant –

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date . . . ; or

(b) if such written consent was not so filed or if his name did not so appear – *on the subsequent date on which such written consent is filed in the court in which the action was commenced.*

29 U.S.C. § 256 (1994) (emphasis added). This statute clearly supplants the provisions of Fed.R.Civ.P. 3 (otherwise applicable to Title VII class actions) which provide that "[a] civil action is commenced by filing a complaint with the court." *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980).

CONCLUSION

For the reasons stated hereinabove and in K Mart's Petition for Writ of Certiorari in Case No. 96-98, this case presents matters of sufficient uncertainty and importance in relation to the procedures for ADEA class action litigation that the questions raised by K Mart in its petition should be reviewed on certiorari. The "conditional" cross-petition filed by respondents highlights the reasons why K Mart's petition in Case No. 96-98 should be granted. However, K Mart respectfully submits that the questions presented by respondents/cross-petitioners regarding the temporal scope of the class do not warrant review by this Court.

Respectfully submitted,

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